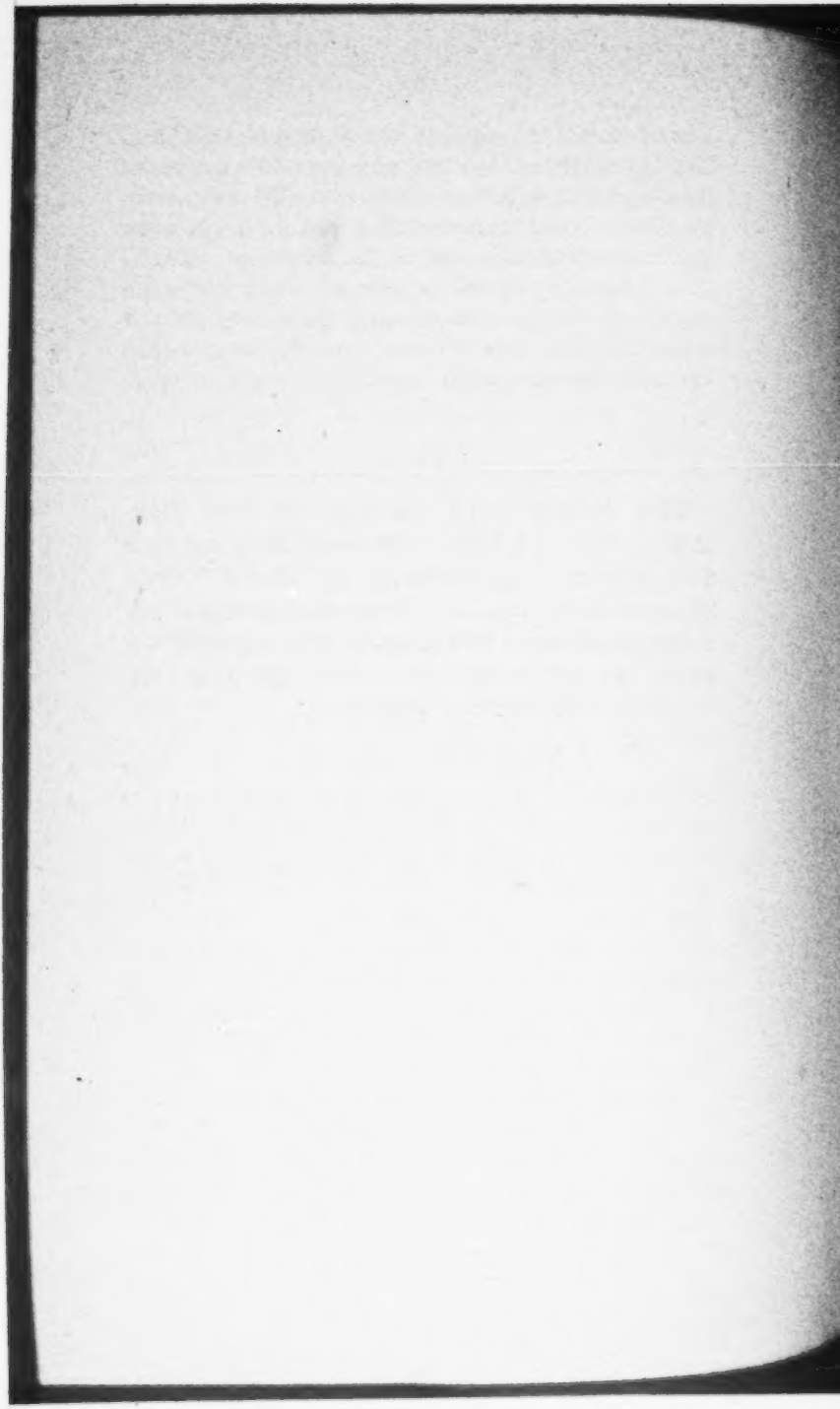

FILED 6 OCT

United States Supreme Court

October Term, 1904.

No. 913.

IN EQUITY.

EDWARD R. WHITNEY, as Trustee in Bankruptcy of DANIEL LE BOY DRESSER and CHARLES E. HESS, as members of the firm of DRESSER & COMPANY,

Complainant,

against

CHARLES H. WENMAN, STUYVESANT FISH, GEORGE C. BOLDT, THE SECURITY WAREHOUSING COMPANY and UNITED STATES MORTGAGE AND TRUST COMPANY,

Appellees.

REPLY BRIEF OF APPELLANT.

ROBERT D. MURRAY,
J. ARTHWALL HOPKIN,
GEORGE H. GILMAN,
Of Counsel for Appellant.

APPEAL PRINTING CO., 15-19 NEDY ST., N. Y. CITY

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 576.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as members of the firm of Dresser & Company,
Appellant,

against

CHARLES H. WENMAN, Stuyvesant Fish, George C. Boldt, The Security Warehousing Company and United States Mortgage and Trust Company,
Appellees.

In Equity.

Reply Brief of Appellant.

Appellees demurred for lack of jurisdiction alone. They argued no other question below. No other question is certified to this Court. Now they try to bolster their case by attacking the merits

of the cause of action pleaded, as if they had demurred generally.

This they cannot do. The certificate raises only the question of "jurisdiction of Courts of the United States *as such*" (Schweer v. Brown, 195 U. S., 171; Lucius v. Cawthorn-Coleman Co., 190 U. S., 149). The merits of the case are not before this Court,* and "the question of jurisdiction alone" can be considered (Act of March 3, 1891, c. 517, §5 (Hennessy vs. Richardson Drug Co., 189 U. S., 25, 33; Huntington v. Laidley, 176 U. S., 668, 679; McDonald v. Smalley, 1 Pet., 620).

We, therefore, confine our discussion to "the question of jurisdiction alone."

On page 20 of The Security Warehousing Company's brief, the case of New York Economical Printing Company (110 Fed., 514) is cited as an authority for the assertion that there should have been an allegation in the bill that there was a judgment creditor in existence, in whose right the trustee was acting.

As to this the subsequent decision of the same Court, U. S. Court of Appeals, 2nd Circuit (*In re* Garcewich, 115 Fed. Rep., 87), to the effect that a fraudulent arrangement whereby the bankrupt was

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* Compare bill of complaint, par. 16 (Record, p. 4), with *In re* Garcewich, 115 Fed. Rep., 87, 89-90, and cas. cit.; Hangen v. Hachemeister, 114 N. Y., 566; Southard v. Benner, 72 N. Y., 424; Russell v. Winne, 37 N. Y., 591. Appellees confuse the New York Lien Law as to chattel mortgages with the Personal Property Law as to pledges and other charges.

enabled to sell and dispose of the property in question as his own, brought the transaction within the positive provisions of the Bankrupt Act, and distinguished it from the Economical Printing Company case, would seem to set at rest any question as to the necessity of the existence of a judgment creditor.

Again, the appellant is of the opinion that the Economical Printing Company case will not be upheld by this Court.

The Lien Law of New York provides that transactions such as are disclosed by the appellant's bill, shall be "absolutely void as against creditors" (p. 4, appellant's original brief, note).

This Court, in Muller vs. Nugent (188 U. S., 1, p. 14), has held that the filing of a petition in bankruptcy is in effect a levy of attachment and it is settled law of the State of New York that an attaching creditor may attack an invalid chattel mortgage, *i. e.*, the transaction disclosed by the appellant's bill (*In re* Economical Printing Company, 110 Fed., 514, p. 517, and cases therein cited).

The other Circuit Courts of Appeals have refused to follow the Economical Printing Company case (Chesapeake Co. vs. Seldner, 112 Fed., 593; *Re* Antigo Screen Co., 123 Fed., 249; *Re* Rodgers, 125 Fed. 169; *Re* Pekin Plow Co., 112 Fed., 308; Spencer vs. Duplex Co., 112 Fed., 638-643), and even in the Second Circuit there is grave doubt as to whether that case is to be longer considered as authoritative (*In re* Beede, 126 Fed., 853).

See also Mueller vs. Bruss, 112 Wisconsin, 406, at p. 412, and cases there cited.

This Court in Hewit vs. Berlin (194 U. S., 302-3) held in construing the statute of New York with

respect to conditional sales, that a trustee in bankruptcy has no standing to attack a voidable transaction thereunder. That decision was under Section 112 of the Lien Law, which reads as follows:

> "Except as otherwise provided in this article, all conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by immediate delivery and continued possession of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency shall be void as against subsequent purchasers, pledgees, or mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, containing such conditions and reservations, or a true copy thereof, be filed as directed in this article."

This section is entirely different from Section 90 of the Lien Law quoted at the foot of page 4 of our original brief, which makes alleged chattel mortgages *void as to creditors.*

In addition to all this, the transaction as disclosed by the bill was a fraud upon the creditors, and the property could have been levied upon by creditors of the bankrupts and sold under judicial process against them as provided by 70a of the act.

It is intimated (p. 32 Security Warehousing Company's brief, and p. 9 of Wenman's brief) that the appellant's bill connot be sustained because he has a remedy by a summary proceeding in the bankruptcy proceeding itself.

This contention of the appellees is somewhat unique.

It is not an infrequent complaint of claimants in bankruptcy proceedings that they have been summarily dragged into a proceeding in which they have no interest and compelled to submit to a determination of their property rights; but this is the first instance in which we have known of the complaint being made that such drastic measures were not instituted.

It would seem unnecessary to devote any attention to this suggestion since, if the Court is without jurisdiction to determine the title to property by a plenary suit in which the parties all have their day in Court with an opportunity to be fully heard, it certainly has not jurisdiction to dispose of the same question of title in a summary and informal manner. The right to proceed summarily certainly carries with it as a necessary consequent, the right to sue by separate though ancillary suit in the same Court, as was done in Minnesota Co. vs. St. Paul Co. (pp. 14-15, appellant's original brief). That case would seem to set at rest any question as to appellant's right to maintain this suit under the general power of a court of equity to reclaim by summary process *or otherwise* property improperly taken from its custody. The ingenious distinction between the Minnesota Co. case and the case at bar drawn by the learned counsel for The Security Warehousing Company (p. 30 of his brief) on the ground that the former is a railroad case, and by the learned counsel for Wenman, *et als.* (pp. 11-12 of his brief) on the ground that it was not a bankruptcy case, needs no comment.

Bardes vs. Bank only held that a plenary suit would not lie to reclaim assets transferred by a

bankrupt prior to his bankruptcy. It did not hold that such a suit could not be entertained where summary proceedings could have been brought.

The trustee could have proceeded by petition against the appellees as was done in the Schloerb case (178 U. S., 542). Instead he chose to proceed by bill in equity as ancillary to the main bankruptcy proceeding, which is itself, in effect, a creditors' bill.

On page 14 of the brief of Wenman, a reference is made to the suit originally brought by appellant in the Supreme Court of New York.

Under a peculiar provision of the New York Code of Civil Procedure, a motion was made to compel the plaintiff to separately number and state the causes of action against the various defendants. This decision was by the Appellate Division of the Supreme Court, and a compliance therewith would have necessitated the bringing of from four to five separate jury actions in conversion, which, in view of the commingling of the silks by the receivers and defendants, would have been impracticable if not impossible. Appeal to the Court of Appeals could not be taken.

Recourse was therefore had to a bill in equity in the District Court, since the New York Code, as interpreted by the inferior court in question, left the appellant practically without a remedy in the Courts of that State.

April 29th, 1905.

ROBERT D. MURRAY,
J. ASPINWALL HODGE,
GEORGE H. GILMAN,
Of Counsel for Appellant.